

IN THE COURT OF APPEALS OF IOWA

No. 2-265 / 91-1981

FILED

AUG 27 1992

WATERLOO SAVINGS BANK, As Administrator of the Estate of
TODD GARY, Deceased, and As Administrator of the Estate of
HENDERSON BROWN, Deceased,

Plaintiffs-Appellees,

vs.

ORLANDER AUSTIN and MORRELL AUSTIN,

Defendants-Appellants.

Appeal from the Iowa District Court for Black Hawk
County, Joseph C. Keefe, Judge.

The Austins appeal a district court judgment awarding
interest on the plaintiffs' recovery for wrongful death
pursuant to Iowa Code section 535.3. **AFFIRMED IN PART;
REVERSED IN PART; AND REMANDED.**

Gene Yagla and Karla J. Shea of Lindeman & Yagla,
Waterloo, for appellants.

Stephen J. Rapp, Waterloo, for appellees.

Considered by Donielson, P.J., and Sackett and Habhab,
JJ.

SACKETT, J.

The question in this case is whether interest on a judgment in a tort suit claiming negligence of one defendant, where the defendant admits liability and there are no allegations of fault raised against other parties, is governed by the provisions of section 535.3¹ or section 688.13² of the Code of Iowa. We hold the provisions of

1. Interest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum applicable rate permitted by the provisions of section 535.2, which rate must be expressed in the judgment or decree. The interest shall accrue from the date of the commencement of the action.

This section does not apply to the award of interest for judgments and decrees subject to section 668.13. (Emphasis added).

2. Interest shall be allowed on all money due on judgments and decrees on actions brought pursuant to this chapter, subject to the following.

1. Interest, except interest awarded for future damages, shall accrue from the date of the commencement of the action.

2. If the interest rate is fixed by a contract on which the judgment or decree is rendered, the interest allowed shall be at the rate expressed in the contract, not exceeding the maximum rate permitted under section 535.2.

3. Interest shall be calculated as of the date of judgment at a rate equal to the coupon issue yield equivalent, as determined by the United States secretary of the treasury, of the average accepted auction price for the last auction of fifty-two week United States treasury bills settled immediately prior to the date of the judgment. The state court administrator shall distribute notice monthly of that rate and any changes to that rate to all district courts.

4. Interest awarded for future damages shall not begin to accrue until the date of the entry of the judgment.

5. Interest shall be computed daily to the date of the payment, except as may otherwise be ordered by the court pursuant to a structured judgment under section 668.3, subsection 7.

6. Structured, periodic, or other nonlump-sum

chapter 688 apply, and reverse and remand the trial court decision to the contrary.

Todd Gary and Henderson Brown were killed when the truck driven by Gary in which Brown was a passenger was struck by a vehicle driven by defendant-appellant Orlander Austin and owned by defendant-appellant Morrell Austin.

Plaintiffs-appellees Waterloo Savings Bank, as administrator of the estate of Todd Gary and as administrator of the estate of Henderson Brown, filed a petition seeking damages from the defendants for wrongful death. The petition claimed the deaths were the result of the negligence of Orlander Austin and that Morrell Austin was liable because he was the owner of the vehicle that Orlander was driving. Prior to trial, the defendants admitted liability. The case was tried on the issue of damages only. The jury returned a verdict in favor of the estate of Todd Gary for \$40,250.70, and a verdict in favor of the estate of Henderson Brown for \$40,263.20; \$70,000 of the amount awarded was for future damages. The trial court entered judgment on the verdict on November 27, 1991. The trial court awarded interest at the rate of ten percent from August 10, 1990, the date of the filing of the petition. The trial court determined interest under Iowa

payments ordered pursuant to section 668.3, subsection 7, shall reflect interest in accordance with annuity principles.

Code section 535.3, which provides for interest on judgments and decrees, but which specifically provides:

This section does not apply to the award of interest for judgments and decrees subject to section 668.13.

Defendants filed a motion to modify judgment contending interest should be calculated on the future damages under Iowa Code section 668.13. Under section 668.13, interest on future damages accrues from the date of judgment, not from the date plaintiffs filed their petition. The trial court denied defendants' motion. The defendants appeal contending interest on damages should be computed under Iowa Code section 668.13.

Plaintiffs argue the only issue in this case was the negligence against defendant driver, consequently, the provisions of section 668.13 do not apply.

The narrow question is whether this tort case must involve an allegation of negligence of more than one person for section 668.13 to be applicable.

Our focus on this issue is to interpret the legislature's directive. Chapter 668 was titled, "An act relating to liability in tort by establishing comparative fault as the basis for liability in relation to claims for damages arising from injury to or death of a person or harm to property. . . ." Act 1984 (70 Ga.) Ch. 1293. In Cowen v. Flannery, 461 N.W.2d 155, 157 (Iowa 1990), the court addressed chapter 668 and said, "A negligence claim for

damages resulting from injury to a person is now brought under the provisions of chapter 668 of the Iowa Code; liability in tort-comparative fault."

In Johnson v. Junkmann, 395 N.W.2d 862 (Iowa 1986), a plaintiff argued chapter 668 is applicable only where the plaintiff's negligence is alleged. The court said:

Nothing in the language of this Act suggests its applicability is triggered only upon a finding or allegation of plaintiff's contributory fault. Rather, the precise and unambiguous language of the Act will be given its plain meaning.

Johnson, 395 N.W.2d at 867.

In Johnson, 395 N.W.2d at 868, the court looked to Iowa Code section 619.17, which in relevant part provides:

A plaintiff does not have the burden of pleading and proving the plaintiff's freedom from contributory fault. If a defendant relies upon contributory fault of a plaintiff to diminish the amount to be awarded as compensatory damages, the defendant has the burden of pleading and proving fault of the plaintiff if any, and that it was a proximate cause of the injury or damage.

Iowa Code § 619.17 (emphasis added).

The court in Johnson, 395 N.W.2d at 868, reasoned that the word "if" in the statutory language clearly anticipates that in certain cases no claim of fault will be raised. The court went on to state:

. . . nothing in that section or in the enactment as a whole gives an indication the failure of any party to raise the issue of contributory fault will itself insulate the claim from the operation of the Comparative Fault Act.

Johnson, 395 N.W.2d at 868.

Whether the driver in this case was negligent was an obvious issue. It was an issue that in the pleadings and confession of judgment was resolved by not seeking to allocate fault to the driver. We do not determine merely because the defendants did not seek to allocate fault to the driver that this case no longer became a tort case to be tried under the provisions of chapter 668. We agree with defendants' argument, there is no valid distinction between a torts case alleging the negligence of one person or entity and a torts case alleging the negligence of more than one person and/or more than one entity. We determine interest on future damages should have been determined under Iowa Code section 668.13(4). We remand to the trial court for that purpose.

On appeal, defendants claim the trial court should have calculated interest on the judgment under Iowa Code section 668.13(3). This claim was not raised and preserved at the trial level and will not be addressed on appeal. Matters not raised in the trial court will not be considered on appeal. See Connor v. State, 362 N.W.2d 449, 457 (Iowa 1985); State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974).

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Donielson, P.J., concurs; Habhab, J., specially concurs.

HABHAB, J. (specially concurring)

I concur in the result only. I hesitate to join the majority because of the statement by our supreme court in Johnson v. Junkmann, 395 N.W.2d 862 (Iowa 1986), that is not discussed. That statement is

The key to determining the applicability of these statutory provisions is the phrase "a claim involving the fault of more than one party." [Iowa Code] § 668.3(2) [1985] (emphasis added) (citation omitted). If a claim involves the fault of more than one party, the statute applies. If not, the statute is not applicable.

Id. at 867.

As the majority points out, the case at bar involves only the negligence of the defendant driver. There is no assertion of negligence against any other party or parties either in the pleadings or answer. In fact, there is a confession as to liability.

I believe the Iowa Supreme Court intended to limit that part of its discussion quoted above in Johnson to section 668.3(2) when it stated that if a claim involves but one party, the statute does not apply. It did not say that Iowa's Comparative Fault Act, chapter 668, failed to apply.

This reasoning is strengthened when section 668.3(2) is considered in light of the factual setting of Johnson. The significant issue in Johnson was whether Iowa's Comparative Fault Act applied when there is not an allegation of fault or finding of fault against the plaintiff, but there is against two faulting defendants. Id. The supreme court

held the act did apply, relying generally on the definition of "fault" and "party." Id. at 867-68.

Thus in Johnson, because the fault involved more than one party, the procedure outlined in section 668.3(2) had to be followed. By the same token, if there was but one party at fault, there would be no need to meet the requirements as set forth in that section.

I set forth my separate reasoning by way of this special concurrence because the appellee relies rather heavily on the above-quoted provision from Johnson to support the argument that because there is but one party at fault, the comparative fault chapter and the provisions thereunder do not apply. But I think there are other provisions in chapter 668 that bring the claim of the plaintiff into the comparative fault statute even though there is but one party alleged at fault.

The types of conduct to which chapter 668 applies are identified in the definition found in section 668.1(1). This includes:

[O]ne or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability.

Iowa Code § 668.1(1) (1985). "The legal requirements of cause in fact and proximate cause apply both to fault as the basis for liability and to contributory fault." Id. § 668.1(2).

As the supreme court stated in Johnson:

The statute defines the term "fault" broadly to encompass many types of tort claims, including those that involve "one or more acts or omissions that are in any measure negligent or reckless." [Iowa Code] § 668.1 [1985]. A "party" on the other hand, is defined in the statute as: (1) a claimant (i.e., plaintiff); (2) a person named as a defendant; (3) a person who has been released from liability by the claimant; or (4) a third-party defendant.

Johnson, 395 N.W.2d at 867. The case at bar is an automobile negligence action and I believe falls within the definition of "fault" and "party." I believe the comparative fault chapter applies.

I would limit our holding in this case to the factual setting before us because a number of instances exist, such as intentional torts and fraud, where the tortious conduct of the adverse party does not fall within the scope of chapter 668. See Tratchel v. Essex Group, Inc., 452 N.W.2d 171 (Iowa 1990). Comparative fault under chapter 668 does not apply as a defense to a dram shop action. Slager v. HWA Corp., 435 N.W.2d 349, 352 (Iowa 1989).